IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-1147

LOCAL 1576, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL,
Respondents

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LIST OF PARTIES

In addition to the parties named in the caption, the following were parties to this proceeding in the Court of Appeals:

Local 307 and Local 851, International Longshoremen's Association, AFL-CIO.

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Local 851, International Longshoremen's Association, AFL-CIO, respectfully requests this Honorable Court to deny the petition for writ of certiorari of Local 1576, International Longshoremen's Association, AFL-CIO, to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 13, 1980.

OPINIONS BELOW

The original opinion of the district court is reported at 334 F.Supp. 976 (S.D. Tex. 1971) and is reprinted in the appendix attached to the petition for writ of certiorari filed by the I.L.A. Local 1576 at App. E (39a-49a). The first opinion of the court of appeals is reported at 511 F.2d 273 (5th Cir. 1975) and is reprinted in the petition for writ of certiorari at App. D (23a-37a). This Court's denial of a petition for certiorari to that judgment is reported at 423 U.S. 994 (1975) and is reprinted in the petition for writ of certiorari at App. C (22a). The decision of the district court on remand is unreported; it is reprinted in the petition for writ of certiorari at App. B (13a-21a). The second decision of the court of appeals—the decision from which certiorari is sought—is reported at 623 F.2d 1054 (5th Cir. 1980) and is reprinted in the petition for writ of certiorari at App. A (1a-12a).

JURISDICTION

This Court has jurisdiction to review the judgment of the court of appeals by certiorari, pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(c), Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e-2(c), provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization:
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual

> because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment oportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 706(g), Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e-5(g), provides, in pertinent part, as follows:

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was

refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) of this title.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW:

This case was originally instituted in 1969 by the United States against the International Longshoremen's Association (I.L.A.) and thirty-seven "deep sea locals" in the port cities of Texas under Title VII of the Civil Rights Act of 1964. The Government alleged that the union and the locals discriminated against Blacks and Mexican-Americans by maintaining segregated locals, hiring halls, and work gangs in violation of Title VII and requested an order directing merger and discontinuance of all segregated locals. The longshoremen's locals involved in this particular controversy are Locals 307 and 851, which are locals comprised of Black members; Local 329, predominately a White[1] local; and, Local 1576, a Mexican-American local.

In 1971 the district court found that the maintenance of completely separate unions would tend to deprive individuals of employment on the basis of race, but held that segregated unions, in themselves, did not constitute a violation of the Civil Rights Act of 1964. The district court

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1. We use the term "White" in this petition, following the lower court's usage, to refer to White longshoremen who are not of Mexican descent. At some places in the record the term "Anglo" is used with the same meaning.

found that "membership of each [longshoremen's] local union [within the State of Texas] is totally segregated on the basis of race or national origin" in accordance with the charter granted by the I.L.A.; that "Negro longshoremen have to be referred out of a Negro local hiring hall, and White longshoremen are referred out of a White longshoremen's hiring hall" and that exceptions to this practice "have been few and far between;" that it is "obvious that a Negro does not apply to a White local and a White does not apply to a Negro local for membership;" and that the maintenance of segregated locals violates Title VII because it deprives all longshoremen of equal working opportunities solely on the basis of race or national origin, *United States v. International Longshoremen's Association*, 334 F. Supp. 976, 978-980 (1971).[2]

Even though the district court specifically found that segregated locals deprived longshoremen of equal employment opportunities, it refused to order the consolidation of the locals in each port and held that Title VII of the Civil Rights Act could be fully corrected by the abolishment of separate hiring halls and the establishment of a common hiring hall and common seniority classifications.

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2. "The court made specific findings concerning two locals in Galveston—Locals 1576 and 329. With respect to Local 1576 it found that its membership is composed predominately of Mexican-American longshoremen with no Blacks and few Whites; that its charter provides that its members can only work bananas and green fruit; and that, because of the restrictions on their charter, members of Local 1576 have been denied an opportunity to work as longshoremen. 334 F.2d at 981. Similarly, the court found that the I.L.A. allows Local 329, a Black union, to work only for four stevedoring companies which provide little work. *Id.* It concluded: [t]he problems caused by this situation would not exist if all longshoremen at the port of Galveston belonged to one local."

The Government appealed the court's refusal to merge the locals and the Fifth Circuit reversed. The Fifth Circuit held that Title VII could not "be satisfied in the present case by measures short of the merger in each particular port of the racially segregated locals within the port." *Equal Employment Opportunity Commission v. International Longshoremen's Association,* 511 F.2d 273, 290 (5th Cir. 1975) *cert. denied,* 423 U.S. 994 (1975). Judge Goldberg stated that segregated unions could not be maintained under Title VII because they inevitably tend to deprive individuals of employment opportunities. *Id.* at 277. Judges Thornberry and Godbold (specifically concurring) stated that segregated unions could not be maintained where, as in the case before it, "they are shown to have had actual discriminatory effect on employment opportunities." In such circumstances, they concluded, the district court has no discretion to refuse merger. *Id.* at 280. The case was remanded to the court "in accordance with the opinion of [the Fifth Circuit]."

In 1973, before the Fifth Circuit had even considered this appeal, three of the four Galveston locals filed a joint motion to exclude Local 1576 from the merger of the hiring halls which the district court had previously ordered.[3] In 1976, after the Fifth Circuit issued its mandate to the district court to merge all the locals in each

3. Local 329 did not join in this Motion. The other three Galveston locals later changed their position and joined sides with the Government requesting that Local 1576 be included in the merger when it was discovered that Local 1576 wanted to maintain dual seniority, which would exacerbate the discriminatory effect of separate locals by giving the Mexican-Americans their seniority in Local 307, while not reciprocating with the two Black locals, 329 and 851.

port, the district court held three hearings on the motion to exclude 1576 from the merger.[4]

The evidence presented at these hearings demonstrated that Local 1576 remained almost exclusively a Mexican-American local. In 1971 Local 1576 had 140 members, of which there were *no* Blacks and only twenty Whites. In 1977 Local 1576 had 250 members, of which there were only three Blacks and thirty Whites. The statistics clearly reflect that from the time the district court found that Local 1576 was a segregated local until 1977, Blacks increased their percentage from zero percent to one percent of the total membership in the union. The percentage of White membership actually decreased from fourteen percent to twelve percent.

The evidence presented at the three hearings demonstrated that members of Local 1576 perform the same nature of work as members of the other Galveston locals. Little skill is required of longshoremen unloading bananas.[5] Similarly, while several job classifications in gen-

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4. These hearings were held on August 16, 1976; February 10-11, 1977; and, September 19, 1979.

5. The petitioner, all through its brief to this Court, attempts to persuade the Court that the longshoremen of Local 1576 have a skill that is unusual and unique, a skill that is not easily acquired except after years of training and experience. The evidence presented in the hearing in September, 1979 is completely repugnant to these contentions. The president of Local 1576, Mr. Louis Sendejas, testified on cross-examination by the undersigned counsel as follows:

Q. So the work is basically the same, but the prime requisite is that you have a healthy body and nothing else; is that right?

A. Yes.

Q. The stronger the back and the better it is built, as long as you can work in 1576, there is nothing to prevent the people in 1576 from doing the work of 307, 851, or 329,

eral cargo work gangs require a certain degree of skill—which generally can be acquired through experience—many employment functions performed by general cargo longshoremen require little or no skill. Banana work is less difficult physically than unloading other kinds of cargo such as cotton or grain, and banana work gangs and other longshore work gangs in Galveston are all selected in substantially the same manner. Both banana and other longshoremen gangs occasionally include inexperienced workers but, with more experienced workers to learn from and to observe, inexperienced longshoremen do not erode the efficiency of longshore work gangs in Galveston.[6]

Local 1576 points out that its seniority system differs from those of the other three Galveston locals in two re-

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because of any requirement of any special talent or skill; is that right?

A. Well, on bananas, you have a little skill on the truck. You have to have some skill. You have got to be trained for that.

Q. I see. And those four Blacks, they have that skill?

A. Well, they learn it like the others do.

Q. That is all right. You don't think that the rest of the Blacks in 851 and 320 could—

A. I am not saying Blacks or Whites or anything. I am saying that any man that goes to work for us has to learn the skill to load it on the truck. You have ventilation space and all that on there.

Q. It would take at least one full day to learn?

A. At least.

Q. Okay. No more than that, though?

A. Anybody could catch on.

Q. Right. So, there really is no real job distinction as between the work being done by 1576 and the others, is there, other than the air conditioning? Is that right?

A. Right.

Mr. Moore: Thank you.

(79Tr.-53-54)

6. 77Tr. 131-132, 144, 148-150, 156-160, 171, 178, 190-198; 79Tr. 52-54, 166-168, 189-190, 205-206.

spects. First, their system is based on steps of one-year intervals while the other locals (307, 329 and 851) are based on five-year intervals. Second, to achieve one year of seniority credit in Local 1576, its members need only work 300 hours per year; members of the other three locals must work 700 hours.

Of Local 1576's 250 members, 43 also have seniority in Local 307, the White local, (since Mexican-Americans have always been included as "Whites") which they gained as a result of being allowed to work general cargo through Local 307's hiring hall. However, because of the discriminatory effect of the founding and maintenance of these separate unions on the sole basis of race, Black longshoremen have been referred only through the two Black hiring halls, Locals 851 and 329, and as a result, have no seniority in either Local 1576 or Local 307.

Thus, members of Local 1576 have the exclusive work of the bananas and, when they are not working bananas, are then able to work with general cargo out of the White Local 307; and, members of Locals 851 and 329 (the Blacks) can rarely work with bananas and green fruit, and, hence, have never been allowed to develop any seniority in either the White Local, 307, or the Mexican-American Local, 1576.[7]

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7. 77Tr. 147-148; 79Tr. 26-28, 33-37, 38-39, 41, 44, 45-46, 55-56, 78, 79, 81, 97, 104-108, 112, 113-115, 164-166, 173-178, 176, 187-189, 191, 194, 198, 200-201, 225-226, 228-229, 232-233, 252-254, 258.

If Local 1576 is not included in the merger of all locals, it can readily be seen that the discrimination which has been fostered from the very inception of the granting of all four of the I.L.A. Local's charters allows an unusual reward to the members of I.L.A. 1576; these members would then benefit from the fact that the Blacks, who have been traditionally excluded from Local 1576, and who have not had the opportunity to develop seniority in Local 1576

Two weeks after its hearing of September 19, 1979, the district court entered its order excluding Local 1576 from the merger and dismissed Local 1576 from the lawsuit, completely reversing its earlier "limited merger" order of November 12, 1971.

Not only did the district court fail to follow the law of the case as established by the Fifth Circuit in the prior appeal, but the district court, in its 1979 memorandum and order, failed to follow its original findings of fact and conclusions of law of 1971.[8] This glaring inconsistency

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through the years, must now share their available work after the mergers of Locals 307, 329 and 851, with the members of Local 1576, who, by being Mexican-Americans, have never been kept out of the White local and, thus, have always been able to accumulate seniority in Local 307.

8. In its Memorandum of November 12, 1971, (App. E, 38a-49a, petitioner's application for writ of certiorari) the court found at 41a that:

> "It has been stipulated that the I.L.A. chartered the locals on the basis of race, and there is no question that it has maintained these locals on the basis of race, has at all times been aware of their segregated nature and has done nothing to seek their merger, or to charter integrated locals since the passage of the Civil Rights Act."

At 47a, the court went on to find:

> "There is no question that individuals belonging to Local 1576 have been denied an opportunity to work as longshoremen, because of the restrictions on their charter. Local 1576 is not seeking a merger, but apparently is demanding an equal right to longshore work in the port of Galveston."

And, at 48a, the district court went on to make its basic findings:

> "The basic finding that the Court is making in this cause is that the Defendants have chartered and still maintain locals on a segregated basis, that the prevalent rule of dividing the work fifty-fifty between the White and Negro locals violates Title VII of the Civil Rights Act of 1965, *because it deprives longshoremen, be they Black or White, Anglo, Mexican-American or Negro, equal working opportunities depending on which group is in the majority in the different ports, and that this will be a continuing violation in the future.*" (Emphasis supplied.)

in not considering its own findings and the district court's refusal to implement the Fifth Circuit's original order of 1975 is all highlighted in the opinion of the Fifth Circuit of August 13, 1980 (reprinted in the petition for writ of certiorari at App. A 8(a), where the court, referring to its first reversal in 1975, stated:

> "When this Court reversed and remanded the case, holding that there was no discretion to refuse merger, it clearly contemplated that the four deep-sea locals in Galveston would be merged. This message was clearly understood; on remand Judge Garza told counsel he would listen to arguments why Local 1576 should not be merged, but 'I just know that the Fifth Circuit is going to send it back to me.' Supp. R. vol. III, at 35. *His prophecy is correct.*" (Emphasis Supplied.)

The Fifth Circuit continued, setting out the gist for its refusal to accept the district court's order of October 1, 1980 by finding:

> "The district court failed to find an applicable exception to the law of the case doctrine to justify its deviation from the court's mandate. There is no contention that controlling authority since this court's 1975 decision dictates a contrary decision of the law applicable to this case; nor did the district court presume to hold that this court's decision was clearly erroneous. *Further, the evidentiary hearings conducted since this court's ruling have not produced any new or substantially different evidence which would justify the exclusion of Local 1576 from the Galveston merger.*" (Emphasis Supplied.)

B. REASONS FOR DENYING THE WRIT

Although the Supreme Court of the United States is not bound by the law of the case doctrine since it did not decide this case on the merits when it denied certiorari in 1975, 423 U.S. 994, it must be noted that the Fifth Circuit reversed the district court's order to exclude Local 1576 from the merger of the other three Galveston locals because it was contrary to the clear mandate of the Fifth Circuit in *Equal Employment Opportunity Commission v. International Longshoremen's Association,* 511 F.2d 273 (5th Cir. 1975), *cert. denied,* 423 U.S. 994 (1975). Since 1975 when four members of the United States Supreme Court refused to grant the previously filed petition for writ of certiorari, there have been no changes in the controlling authority since the Fifth Circuit's 1975 decision; nor did the district court find that the Fifth Circuit's prior decision was clearly erroneous; nor did the district court find any new or substantially different evidence that would require or remotely justify the exclusion of Local 1576 from the Galveston merger. In short, there is no basis to grant a review of the judgment of the United States Court of Appeals for the Fifth Circuit, *Equal Employment Opportunity Commission v. International Longshoremen's Association,* 623 F.2d 1054, 1059 (1980).

The subsequent hearings held by the district court did not produce any substantially different evidence than what was produced in 1971. The only new evidence that could have justified excluding Local 1576 from the merger would have been evidence that the local is no longer segregated or that its segregated existence does not deprive any group of equal employment opportunity. *The*

evidence demonstrated the contrary. Local 1576, still chartered as a union for Mexican-Americans, remains functionally segregated. *E.E.O.C.*, 623 F.2d at 1059. The district court in its 1971 opinion found the following facts:

> "While attempts were made to prove to this court that a Negro could apply for membership in a White local and vice versa, it is obvious that a Negro does not apply to a White local and a White does not apply to a Negro local for membership. Negro longshoremen have to be referred out of a Negro local hiring hall and White longshoremen are referred out of a White longshoremen's hiring hall. While there may have been exceptions in the past, they have been few and far between." 334 F. Supp. at 978.

These discriminatory practices have not changed since 1971. Few, if any, Black longshoremen obtain employment through the White local or 1576. In fact, out of a membership of 250, in 1977 there were only three Black members in Local 1576.

I. THE DECISION OF THE COURT OF APPEALS REGARDING THE SENIORITY SYSTEM OF I.L.A. LOCAL 1576 IS NOT CONTRARY TO THE APPLICABLE DECISIONS OF THIS COURT AND IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

A close reading of 42 U.S.C. § 2000e-2(h),[9] hereinafter referred to as Section 703(h), reveals that it is not

9. (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority

applicable to the facts of our case and, therefore, the decision of the court of appeals is not in conflict with this court's opinion in *Teamsters v. United States,* 431 U.S. 334 (1977). Section 703(h) pertains to situations where an *employer* applies "different terms, conditions, or privileges pursuant to a bona fide seniority system." In our case, Local 1576 set up its own seniority system; and, in fact, the evidence reflects that they modified that seniority system on several occasions. (79Tr.-15 and App. B [15a] of the petition for writ of certiorari.) It is the internal duty of Local 1576's union officials to determine who has seniority and what workers to send to the stevedore companies for unloading. A literal interpretation of Section 703(h) would require this court to disregard the "seniority system" exception and uphold the merger of the four deep sea longshoremen locals.[10]

Even if this Court might find that Section 703(h) is applicable, the decision of the court of appeals is still not contrary to this court's decision in *Teamsters v. United*

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or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, . . .

10. The petitioner contends that the merger of Local 1576 with the other three locals in Galveston, Texas should not have been ordered because the merger abolishes its lawful seniority system. The petitioner tells this court that the other three locals maintain a common seniority system with Local 1576's seniority system being separate. Each local has its own seniority system. For example, if a member of Local 851 has five years seniority with Local 851 and goes to Local 329, he will only receive employment as a Temporary and cannot use his five years seniority with 851 as a means of being hired at 329. Therefore, each of the other three locals will have their respective seniority systems abolished by the merger. If petitioner's argument is correct, then the court of appeals' merger of the other three locals would also have been incorrect.

States, in that the petitioner's seniority system was not "bona fide." In *Teamsters* this Court relied on Section 703(h) to uphold the seniority system under review even though the seniority system was not justified by business necessity and operated to freeze the status quo of prior discriminatory employment practices. The court concluded that Section 703(h) would apply if the seniority system was found to be "bona fide." In determining whether a seniority system is bona fide, the totality of circumstances in the development and maintenance of that system is relevant in examining "whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system [which is] integral to a determination that the system is or is not bona fide. *Swint v. Pullman-Standard,* 624 F.2d 525 (5th Cir. 1980); *Dobbs v. City of Atlanta, Georgia,* 606 F.2d 557 (5th Cir. 1979); *Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979); *James v. Stockham Valves & Fittings Co.,* 559 F.2d 310, 352 (5th Cir. 1977).

The court of appeals in *James, Supra* at 352, discussed four factors from *Teamsters* in determining whether a seniority system is bona fide:

(1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;

(2) whether the seniority units are in the same or separate bargaining units;

(3) whether the seniority system has its genesis in racial discrimination; and,

(4) whether the system was negotiated and has been maintained free from any illegal purpose.

The seniority system does not operate to discourage employees from transferring between seniority units.

The relative seniority system of the four locals discourages Blacks more than any other group from transferring between seniority units. In *Teamsters,* the court found that the seniority system applied equally to all races and ethnic groups and "to the extent that it 'locks' employees into non-line-drivers jobs, it does so for all." The court found that "not all city drivers and servicemen who are discouraged from transferring to line-driver jobs are all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority is White." *Teamsters, supra* at 355. Therefore, Whites working as city drivers were faced with the same dilemma as the Black workers in *Teamsters* in that to leave one's position as a city driver a White worker, as well as a Black worker, would have to forfeit his city driver seniority. In our case, the relative seniority systems are not applied equally to all races and ethnic groups. Blacks are locked into their "general cargo jobs" within Locals 851 and 329, not being able to acquire seniority in the more desirable banana boat work.[11]

Local 1576 is in a separate bargaining unit from the other three locals.

Even though Local 1576 is in a separate bargaining unit from the other three locals and that separate bargain-

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11. A good example of the disparity was reflected in the district court's 1971 opinion. In 1971 Local 329 was only allowed by the I.L.A. to work for four stevedoring companies and was seeking a merger of the locals so it could be given more work. The members of Local 329, exclusively Black, would be discouraged from seeking employment from the other locals without any seniority in those locals.

ing unit is consistent with the National Labor Relations Board precedent defining separate units of banana handlers in the longshore industry, it must be remembered that Local 1576 was created by Mexican-Americans who left Local 307. The present seniority system was not implemented until after the enactment of Title VII of the Civil Rights Act.

The seniority system had its genesis in racial discrimination.

All the parties to the lawsuit stipulated that "the I.L.A. chartered the locals on the basis of race, and there is no question that it has maintained these locals on the basis of race, has at all times been aware of their segregated nature and has done nothing to seek their merger or to charter integrated locals since the passage of the Civil Rights Act." 334 F. Supp. at 978. The purpose of chartering separate locals was to maintain workers in separate locals whereby Blacks would work together in Black locals, Whites in White locals and Mexican-Americans in Mexican-American locals. Because of the stipulation of the I.L.A. and the finding of the district court on this issue, it is apparent that the establishment and maintenance of the segregated locals was based on no other consideraiton than the objective to separate the races.

The system was not negotiated nor has it been maintained free from any illegal purpose.

As referred to previously, the local longshoremen unions had their genesis in racial discrimination. Each local union maintained its own membership based on race and had its own seniority system. The individual

seniority systems would encourage Blacks to stay with Blacks, Whites with Whites, and Mexican-Americans with Mexican-Americans.[12]

II. THE DECISION OF THE COURT OF APPEALS IN ORDERING THE MERGER OF THE LOCAL UNIONS IS NOT CONTRARY TO THE DECISIONS OF THIS COURT REQUIRING THAT TITLE VII BE APPLIED IN A MANNER CONSISTENT WITH OTHER STATUTES EXPRESSING THE NATIONAL LABOR POLICY.

The petitioner takes an overly broad view of this Court's statements that Title VII must be interpreted and administered in accordance with national labor policy and is incorrect in its assertion that the court of appeals in this case made no attempt to accommodate its remedial order with the national labor policy.

In *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50 (1975), this Court held that the National Labor Relations Act does not give minority employees the right to bypass their exclusive bargaining representative in order to bargain with their employer over issues of employment. This Court's decision dealt with the orderly process of union representation which could only be guaranteed by exclusive representation. This Court only interpreted the mandate of Congress in that members of unions be given the right to gather their collective strength and bargaining power when dealing with their

12. Notwithstanding the fact that only one percent of Local 1576's membership was Black in 1977, a Black individual working in Local 851 would still be discouraged from seeking employment in Local 1576 because any hours accumulated with Local 1576 would not apply to his obtaining his 700 hour per standard at Local 851.

employer and not allow certain individuals as splinter groups to dilute the union's collective strength.[13]

The court of appeals implemented the most appropriate remedy in ordering the merger of the four deep sea longshoremen locals. Although Local 1576 has a separate bargaining unit and does not deal with the same employer as the other three locals, it must be remembered that Local 1576's charter was borne out of the discriminatory chartering of the locals by the I.L.A. In addition, the jobs performed by the members of Local 1576 are sufficiently similar to the jobs performed by the members of the other locals. The record shows that all Galveston longshoremen perform the same nature of work; that the work is essentially unskilled, with those skills required for certain job classifications readily acquirable through work experience; that some members of Local 1576 regularly work through Local 307 performing general cargo functions; that inexperienced workers are frequently included in work gangs and their inclusion does not diminish the ability of gangs to perform efficiently and that any individual who is physically capable can per-

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13. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 135 (1977) this court held that an agreed upon seniority system in a collective bargaining agreement could not give way so that an airline employee would not have to work on Saturdays contrary to his religious beliefs. This court based its opinion on the "seniority exception" of Section 703(h) of Title VII and its opinion in *Teamsters v. United States*, 431 U.S. 324, 352 (1977). As discussed in Part I of this brief, this case can be distinguished from this court's opinion in *Hardison*. Likewise, in *California Brewers Association v. Bryant*, 444 U.S. 598 (1980) this court based its decision on Section 703(h) of Title VII and its opinion in *Teamsters* in holding that a provision in a statewide brewery industry collective bargaining agreement requiring a "temporary" employee to work at least 45 weeks in a simple calendar year before becoming a "permanent" employee was a component of a "seniority system" within Title VII. As discussed in Part I of this brief, this case can be distinguished from *Bryant*.

form longshore work regardless of the particular commodity being loaded or unloaded.[14]

Although its members wanted to be excluded from the merger in 1971, they wanted more "general cargo" business because their charter was limited to green fruit and bananas. The members asked the I.L.A. and the district to remove the "green fruit" restriction on their charter because the green fruit business was drastically reduced at that time. They were denied an opportunity to work because of the restrictions on their charter which arose out of the discriminatory chartering of the locals by the I.L.A. Local 329, one of the four Black locals, is only allowed by the I.L.A. to work for four stevedoring companies and has very little work. The district court recognized this problem that had arisen out of the artificial creation of locals because of race and national origin. It saw that many workers, be they Black or Mexican-American, were denied the opportunity to work simply because of their race or national origin. In fact, the court stated:

> "The problems caused by this situation would not exist if *all* longshoremen at the port of Galveston belonged to *one* local." (App. E [48a] of petition for writ of certiorari) (Emphasis supplied.)

In 1981 the same problems exist except that the green fruit business has increased while the other cargo business has diminished. Again, Blacks are denied opportunities to work simply because of the discriminatory chartering of the locals. The district court's finding of

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14. (77Tr. 149-50, 156-60, 171, 178, 182, 184-85, 187-88, 190, 192-93, 194-95, 198; 79Tr. 52-54; 77Tr. 144, 148-50, 180-81, 183, 193, 208; 79Tr. 53, 166-68, 205-06).

ten years ago remains true today in that unemployment problems of Blacks on the Galveston waterfront "would not exist if all longshoremen at the port of Galveston belonged to one local." The sloathful, foot-dragging procession of this attempted merger has continued to dominate the plight of all longshoremen in Galveston, whether they be Black, White or Brown!

For these reasons, the exclusion of Local 1576 from the Galveston merger "would deprive or tend to deprive" individuals of equal employment opportunities. *See* 511 F.2d at 277; *Bailey v. Ryan Stevedoring Co.*, 528 F.2d 551, 556-557 (5th Cir. 1976) *Cert. denied, sub nom., Local 1830 International Longshoremen's Association v. Bailey*, 429 U.S. 1052 (1977). Local 1576 must be included in the merger. Such a merger will provide necessary employment security to all Galveston longshoremen, which all longshoremen have missed since the Government took up its task over eleven years ago. As the history of the port of Galveston has shown, fluctuation in business at the port among the four locals has meant that working opportunities have not been divided evenly among the four locals. Without the merger of all the locals, Black longshoremen will continue to have little or no opportunity to obtain work unloading bananas and green fruit; and, in the event the banana and green fruit business should decline, many Mexican-American longshoremen will have less opportunity to obtain general cargo work. With this in mind, the court of appeals made a factually correct and legally sound decision in ordering the merger of all four deep sea longshoremen locals into one.

III. THE DECISION OF THE COURT OF APPEALS ORDERING CHANGES IN BUSINESS OPERATIONS IS NOT IN CONFLICT WITH ANOTHER CIRCUIT.

In its most alluring effort to create magic, the petitioner now claims that the decision of the Court of Appeals for the Fifth Circuit has the effect of ordering major changes in business operations, and that such a ruling is in conflict with the holding of another circuit court. In making its "bootstrap" attempt to obtain a review of the Fifth Circuit's order, the petitioner weaves a "straw man" with liberally laced conclusions concerning the effect the merger of Local 1576 will have on Southern Stevedoring Company, none of which can be found either in the record or in any of the findings of fact of the district court. In neither of its orders of 1971 and 1979 did the district court ever give the slightest hint that it could see any adverse changes in the business operations of Southern Stevedoring Company. In the eleven years that this case has been pending, Southern Stevedoring Company has obviously made no attempt to file a petition in intervention nor any other petition for relief. Neither has it made any effort to protect any "so called business interests" that would be adversely affected because of the merger of Local 1576 with the other Galveston locals. The reason for this is obvious; the merger of all Galveston locals will give this company a larger and more readily available work force.

Since Southern Stevedoring has been aware for the last eleven years that a merger of all locals in Galveston was due, it is logical as well as equitable for any court

to conclude that there will be no adverse effects on Southern Stevedoring Company.[15]

Nonetheless, the petitioner argues that the opinion of the Second Circuit in *E.E.O.C. v. Local 14, International Union of Operating Engineers,* 553 F.2d 251 (2d Cir. 1977) is in conflict with the opinion of the Fifth Circuit in our case. The Second Circuit in *E.E.O.C.* did not hold that a court could not use its Title VII remedial power to restructure business practices. In that case the contractors associations did not participate in the trial of the case, and consequently, were not allowed to offer evidence as to the effect of the merger of the two locals upon them. The Second Circuit reversed the district court's order because "included in the pretrial order issued by the district court was a stipulation between GCA [the contractors association] and the E.E.O.C. that the former would have 'a full opportunity to offer proof' on the issue of relief." *E.E.O.C., supra* at 257. Even a broad reading of this case could only be interpreted to allow the employers to introduce evidence as to the effect of the merger on their business. The decision does not prohibit the restructuring of the employers' business operations in order to cure violations of the Civil Rights Act.

The petitioner also argues that this Court's holding in *Furnco Construction Corp. v. Waters,* 438 U.S. 567

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15. It is also noted that Southern Stevedoring Company offered no evidence at the hearing of September, 1979. On the other hand, West Gulf Maritime Association did participate in all evidentiary hearings and its most scholarly and learned counsel, Mr. Bryan Williams (who, unfortunately, is now deceased) specifically informed the district court that his client was taking no position regarding the merger of Local 1576 with the other locals. (79Tr. 260-261)

(1970) that federal courts cannot order a remedy against an employer that has not violated the Act stands for the principle that courts cannot order changes in a party's business operations. *Furnco* is clearly distinguishable from the facts in our case and even the petitioner's broader interpretation should not be applicable to our case. In *Furnco* it was the employer, and not a union, that was alleged to have violated that Act. Furthermore, the *Furnco* court reversed the court of appeals' finding that the employer had violated the Act because of the treatment of the nature of the evidence necessary to rebut a prima facie case of discrimination. The *Furnco* court said that since the employer could articulate legitimate and nondiscriminatory reasons for the rejection of certain Blacks from employment, it was able to rebut the Government's prima facie case. *Furnco,* 438 U.S. at 578. In our case, Local 1576 never did substantiate why in 1971, it did not have one Black member; and why in 1977, it had only three Black members!

IV. THE DECISION OF THE COURT OF APPEALS IS NOT CONTRARY TO THIS COURT'S DECISIONS GOVERNING THE ALLOCATION OF AUTHORITY WITHIN THE FEDERAL SYSTEM.

The petitioner argues that the Fifth Circuit overstepped its limitation of power when it ordered the district court to implement a remedy more encompassing than the one fashioned by the district court and contends that the Fifth Circuit's mandate to the district court to merge all of the segregated union locals was therefore erroneous.

A district court must fashion its remedy in light of the purposes of Title VII of the Civil Rights Act. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417, the Supreme Court, in citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), stated that the primary objective of Title VII was a prophylactic one:

> It was to achieve equality of employment opportunities and remove barriers that have been operated in the past to favor an identifiable group of White employees over other employees.

The *Albemarle* court further stated:

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to secure complete justice. . . . Where racial discrimination is concerned, 'the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. *Albemarle, supra* at 418.

The district court failed to carry out the mandate of Congress when it enacted 42 U.S.C. § 2000e-2(c)(2).[16]

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16. In its MEMORANDUM and ORDER of October 1, 1979, the trial court made many determinations of fact, which were not sustained by the record, in order to achieve the result that it wanted, to-wit: to find a basis to exclude Local 1576 from the merger. It should be noted that many letters and pleas by the Mexican-Americans had been sent directly to the district court through the years without the other parties to this lawsuit having been notified of same and without the other parties to this lawsuit having been furnished copies of any such letters. These were in the nature of

That statute puts an extremely heavy burden on those who wish to maintain segregated unions. Even though by having a "common hiring hall" whereby Blacks would be entitled to be picked for longshore work on the same footing as Whites and Mexican-Americans as the district court formulated in its 1971 opinion, there still would be maintained "separate but equal" union locals. Under

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"ex parte" communications with the court by the members of Local 1576, none of whom were, of course, attorneys in the case. (79Tr. 258-260)

The most glaring example of the district court's unwillingness to be bound by the evidence in the record is in its memorandum and order when it considered what it called its "three alternatives" with regard to an appropriate action. The court described its first alternative as merging the four locals together under a uniform seniority system; its second was to order a merger excluding 1576, but requiring those members of Local 1576 that have dual seniority to choose between Local 307 and Local 1576. The third alternative, and the one that the court chose was to order the merger excluding 1576 and allowing its members to retain their dual seniority.

In discussing its stated first alternative in its memorandum and order, the court reasoned:

> *"If the merged local would grant a year's seniority to any longshoremen who had qualified in his own local and who had been available for longshore work regardless of the hours worked, the first alternative would be acceptable."* (App. B, 18a, petitioner's application for writ of certiorari) (Emphasis Supplied)

With respect to testimony that the court elicited from Mr. Leroy Hoskins, President of Local 851, the court then went on to say that:

> *"Nonetheless, it was apparent that Mr. Hoskins did not agree with his attorney's stipulation."* (Footnote 3, App. B, 18a, petitioner's application for writ of certiorari) (Emphasis Supplied)

A close review of the record and the facts of that hearing indicate that the district court's statement is absolutely untrue. After the court had elicited an answer from Mr. Hoskins, counsel for Local 851 made a stipulation into the record which was accepted by Mr. Hoskins and which was then, as well as now, still binding on Local 851. Local 851 had made the stipulation that it would allow and grant a year's seniority to a longshoreman in Local 1576 who had qualified in his own local with 300 hours, assuming that Local 1576 was merged with the other three locals. Nobody except the district court, in its memorandum and order, rejected that stipulation. (79Tr. 214-216)

the district court's original plan, Black, White and Mexican-American longshoremen could conceivably be paid the same wages, have an equal number of representatives on the contract negotiating team, and under a common seniority and hiring hall system, be assured of an equal chance of obtaining longshore work. The Fifth Circuit recognized that merely placing the Black longshoremen on the same economic level as the White and Mexican-American longshoremen was not what Congress intended in passing Title VII. As the Fifth Circuit discussed in the first review of this case, "any segregation which tends to deprive an individual of opportunities is illegal," 511 F.2d at 517. The Fifth Circuit saw the incompletion of the district court's remedy in light of the "separate but equal" cases which have been handed down by this court since *Brown v. Board of Education,* 347 U.S. 483 (1954)[17] and the legislative purpose behind the passage of Title VII.

Under the district court's 1971 remedy, there would still be one White local, two Black locals, and one Mexican-American local in Galveston, Texas. A Black man seeking longshore employment under those conditions might make the same wages as the White or Mexican-

17. As noted in the Fifth Circuit's Opinion, the Supreme Court subsequently summarily decided a series of cases in which it held that racially separate facilities were inherently unconstitutional; the Court came to those decisions without regard to any evidence of material equality. See, e.g., *New Orleans City Park Improvement Ass'n v. Detiege,* 1958, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46, aff'g 5 Cir. 1958, 252 F.2d 122 (segregated parks). *Gayle v. Browder,* 1956, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, aff'g *Browder v. Gayle,* M.D. Ala. 1956, 142 F.Supp. 707 (segregated sectioning of buses); *Mayor and City Council of Baltimore v. Dawson,* 1955, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774, aff'g *Dawson v. Mayor and City Council of Baltimore,* 4 Cir. 1955, 220 F.2d 386 (segregated beaches).

American, but he would still be faced with lawfully sanctioned segregation. Since a Black individual might not want to work in a segregated local and would not be hired by one of the non-Black locals because of his color, he would, in essence, be deprived of employment opportunity.

The petitioner argues that, on remand, the district court made extensive findings that Local 1576 never violated Title VII and never discriminated against anyone. These findings are contrary to the findings of the district court in its 1971 opinion, and pursuant to the prior mandate of the Fifth Circuit in 1975, should not have been made. The Fifth Circuit ordered the district court to merge all the locals in each port in Texas and, contrary to the mandate, the district court heard additional evidence and made additional findings of facts which were not authorized by the Fifth Circuit. Unless the Fifth Circuit's decision in 1975 was erroneous, the findings of fact of the district court in 1979 are clearly immaterial to this appeal. Therefore, the district court's previous findings that "membership of *each* [longshoremen's] local union [within the state of Texas] is totally segregated on the basis of race or national origin," 334 F.Supp. at 978, and the evidence that even though Local 1576 had 140 members in 1971, with no Black members, should be controlling (Emphasis supplied.)

Furthermore, the petitioner argues throughout its brief that it never intentionally discriminated against anyone. Title VII is not concerned with the employer's or union's "good intent or absence of discriminatory intent" for "Congress directed the thrust of the Act to the conse-

quence of employment practices, not simply the motivation," *Griggs v. Duke Power Co., supra; Albemarle Paper Co. v. Moody, supra; Teamsters v. United States, supra.*[18]

CONCLUSION

The petition for writ of certiorari of Local 1576, International Longshoremen's Association, AFL-CIO, to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 13, 1980 should be denied.

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18. *See also Watson v. City of Memphis*, 373 U.S. 526, 536 (1963); *Wright v. Council of Emporia*, 407 U.S. 451, 461-62.